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No. 87-992

IN THE

Supreme Court of the United States

October Term, 1987

J.E. MCNEIL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF IN SUPPORT OF CERTIORARI

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The most notable feature of the memorandum in opposition to certiorari is what it does not contain. First and most important, the opposition never suggests that the interpretation of Rule 11, and in particular its applicability where a sanction is based on a finding that the legal position of a party is wholly lacking in merit, is an unimportant question which this Court need not address. In fact, the need for this Court to clarify Rule 11 continues to be demonstrated by the ever-increasing frequency with which the courts of appeals have sought to issue broad decisions in an effort to reduce litigation over the proper construction of the Rule.

Thus, the Fifth Circuit has issued an *en banc* opinion because of the "high import of Rule 11 to both the bench and bar . . .." *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866,

868 (1988), joining the Eleventh Circuit which had previously sought to clarify the meaning of the rule in *Donaldson v. Clark*, 819 F.2d 1551 (1987), and the Tenth Circuit which went *en banc* to clarify related questions under Rule 38, Federal Rules of Appellate Procedure, which provides for sanctions for wholly meritless appeals, and under 28 U.S.C. § 1927, which authorizes payment of attorneys' fees when an attorney unreasonably multiplies a proceeding. *Braley v. Campbell*, 832 F.2d 1504 (1987). Hardly an advance sheet of the Federal Second Reporters goes by without one or more significant Rule 11 cases, and in 836 F.2d No. 2, dated February 22, 1988, there were four opinions containing major discussions of the Rule. *See, id.* at 866, 1063, 1068, & 1156. Furthermore, a non-exhaustive review of recent issues of the United States Law Week indicates that there were at least four other petitions filed in this Court between late November and mid-January in which Rule 11 was the major, if not only, question presented, Nos. 87-828, 87-873, 87-1210, and 87-1216, as well as two petitions regarding a case raising similar issues under 28 U.S.C. § 1927, Nos. 87-710 and 87-735.

Second, respondent never mentioned this Court's decision in *Talamini v. Allstate Insurance Co.*, 470 U.S. 1067 (1985), on which the petition prominently relied, and in which the plurality opinion made clear its concerns over the dangers of excessive use of sanctions to dampen the ardor of attorneys taking creative legal positions in support of their clients. Similarly, although purporting to distinguish the Ninth Circuit's opinion in *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531 (1986), respondent never deals with the more fundamental question of the wholly different attitude toward the issue of sanctions between *Golden Eagle* and this case, and the far greater concern for the chilling effect there than shown by the court of appeals here.

The opposition also fails to respond to the point made in the petition regarding decisions from other circuits, such as *Oliveri v. Thompson*, 803 F.2d 1265 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1373 (1987), and *Donaldson v. Clark*, *supra*, in which the courts were far less willing to impose sanctions than were the courts in this case. Moreover, since the filing of the petition, several courts of appeals have issued opinions which further underscore the fact that the decision below is not in the mainstream of interpretation of Rule 11. *See Gaiardo v. Ethyl Corp.*, 835 F.2d 479 (3d Cir. 1987); *Burull v. First National Bank of Minneapolis*, 831 F.2d 788 (8th Cir. 1987); and *Century Products Inc. v. Sutter*, 837 F.2d 247 (6th Cir. 1988). As Judge Weiss observed in *Morristown Daily Record, Inc. v. Graphic Comm. Union*, 832 F.2d 31, 32 n.1 (3d Cir. 1987), in language which could properly be directed at the decisions in this case: "We caution litigants that Rule 11 is not to be used routinely when the parties disagree about the correct resolution of a matter in litigation. Rule 11 is instead reserved for only exceptional circumstances."

Third, respondent never contends that this case is unsuitable for resolving a number of important questions under Rule 11. The most significant of these is the appropriate standard for deciding when a position is so legally untenable that it violates Rule 11. However, there are a number of other issues, including whether the manner of presentation of a legal argument can ever justify sanctions, as the courts below held it could. In addition, the Court will be able to address what type of notice must be given of the basis for the claim of sanctions, and what kind of opportunity to respond must be afforded. That problem is presented here because of the shifting rationales used first by the government to request sanctions, then by the district court in imposing them and then denying reconsideration of them, and finally by the court of appeals in affirming the award on a still different basis. That aspect

of Rule 11 continues to be an important issue for litigation, albeit in situations somewhat more extreme than that presented here. *See, e.g., Sanko Steamship Co. v. Galin*, 835 F.2d 51 (2d Cir. 1987); *Tom Growney Equip. Inc. v. Shelley Irrig. Develop., Inc.*, 834 F.2d 833 (9th Cir. 1987). And, while not a principal focus of the petition, the standard to be used by the court of appeals in reviewing decisions under Rule 11 needs clarification, especially in light of the recent decision of the Fifth Circuit in *Thomas v. Capital Security Services, Inc., supra*, 836 F.2d at 872, which applied an abuse of discretion standard on an across-the-board basis to all decisions involving Rule 11, a ruling which that court acknowledged was inconsistent with the position taken by many other courts, including the court of appeals here. *See* Pet. App. at 3a. *But see Century Products Inc. v. Sutter, supra*, (majority using abuse of discretion standard to overturn sanction, with concurrence applying *de novo* review).

Instead, most of the opposition is directed at arguing why petitioner's client was not entitled to take a war tax deduction (a matter never at issue in this case), why the penalty under section 6702 was proper (an issue no longer involved in this case), or why petitioner's First Amendment argument is in reality a claim that Rule 11 is unconstitutional as an infringement on the right to petition the government to redress grievances (an argument which we have never made). To the extent that respondent argues the merits of upholding the sanctions decision, that too is not the focus of the debate at this juncture. But if it were, the opposition wholly fails to respond to our contention that if, as respondent suggests, the ruling on the legality of the section 6702 penalty was so "evident" (Opp. at 7), why did the government need nearly 40 pages in its court of appeals' brief to answer the taxpayer's claim?

There are other weaknesses in respondent's defense of the rulings below, but that is not what is now at issue before the

Court. What is before the Court is whether the interpretation of Rule 11, as applied to allegedly meritless legal positions, presents an important question requiring resolution by this Court, and whether this is an appropriate vehicle for doing so. For the reasons set forth above and in the petition itself the answer to both questions is in the affirmative, and therefore review should be granted.[1]

Respectfully submitted,

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[1]It is with some reluctance that we renew the debate over what the Court should do if it determines that, because the notice of appeal did not formally list petitioner as an appellant, the court of appeals lacked jurisdiction over her appeal. See Petition at 8 n.3 and Opp. at 4 n.5. Respondent in effect argues that it is entitled to be hypertechnical in insisting that the notice of appeal be filed in both names, but that it may disregard entirely the fact that there has never been a judgment entered against petitioner for the amount of the sanction. However, the authorities relied on by respondent in note 5 stand only for the proposition that a would-be appellant may not, through the use of a Rule 60(a) motion to correct clerical errors, obtain an extension of time for filing an appeal. They do not apply in this instance because the motions were made by the appellee (respondent here), and they are hardly clerical errors of the kind involved in respondent's cases since here they go to the very identity of the person against whom the judgment is to run. *Cf. Schiavone v. Fortune*, 106 S.Ct. 2379 (1986). While we believe that there is no need to deal with any of these technical issues, since the court of appeals properly determined that all parties understood precisely the nature of the appeals and who was taking them, we are confident that petitioner is not in a situation where both her time for appeal has expired, and she was not properly in the court of appeals.